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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MICHAEL J. EVANCHYK, JR., Petitioner.	2 CA-CR 2008-0087-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-44333

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Rick Unklesbay
Tucson
Attorneys for Respondent

Michael John Evanchyk, Jr.
Tucson
In Propria Persona

V Á S Q U E Z, Judge.

¶1 In 1994, a jury found petitioner Michael Evanchyk, Jr. guilty of second-degree murder and conspiracy to commit first-degree murder. The trial court sentenced him to concurrent prison terms of fifteen and twenty-five years. We affirmed Evanchyk's convictions and sentences on appeal, *State v. Evanchyk*, No. 2 CA-CR 94-0533 (memorandum decision filed Apr. 23, 1996), vacated the trial court's imposition of community supervision after sentencing, *State v. Evanchyk*, No. 2 CA-CR 96-0289 (memorandum decision filed Jan. 14, 1997), and denied relief on his petition for review of the trial court's denial of his first petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., *State v. Evanchyk*, No. 2 CA-CR 97-0505-PR (memorandum decision filed Aug. 4, 1998).

¶2 Evanchyk then filed a petition for writ of habeas corpus in the United States District Court, which certified questions of law to the Arizona Supreme Court. *Evanchyk v. Stewart*, 202 Ariz. 476, 47 P.3d 1114 (2002). Our supreme court subsequently found that, under Arizona law, intent to kill is an essential element of the offense of conspiracy to commit first-degree murder. *Id*. ¶ 18. The federal district court granted Evanchyk's habeas corpus petition on that charge, and the Ninth Circuit Court of Appeals affirmed the order vacating Evanchyk's conviction and sentence for conspiracy to commit first-degree murder. *Evanchyk v. Stewart*, 340 F.3d 933, 943 (9th Cir. 2003). Evanchyk thereafter filed a second petition for post-conviction relief, asserting claims based on newly discovered and newly available evidence, actual innocence, ineffective assistance of trial counsel, and a significant

change in the law. The trial court summarily dismissed his petition and denied his motion for rehearing, and this pro se petition for review followed. We review a trial court's order denying post-conviction relief for an abuse of discretion. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). We find no abuse here.

¶3 Evanchyk argues, as he did below, that certain pretrial statements made by his codefendants proved his innocence. He contends these statements, which he acknowledges were available before trial, constituted either newly discovered evidence pursuant to Rule 32.1(e), Ariz. R. Crim. P., or newly available evidence proving his innocence pursuant to Rule 32.1(h), Ariz. R. Crim. P. He also asserts he could not have raised this claim in the years since the 1994 trial because he had to wait until his codefendants had exhausted their post-conviction rights.

¶4 The trial court rejected his claim of newly discovered evidence, noting the pretrial statements had been made "long before trial and . . . were available to all defense counsel and defendants." Presumably for this reason, Evanchyk acknowledges the pretrial statements "technically" may not have been newly discovered. *See* Ariz. R. Crim. P. 32.1(e)(1). Relying on Rule 32.1(h), he alternatively contends the court should have considered the statements as newly available. He argues the court should have first determined whether it had properly denied his motion to sever his trial from that of his codefendants, claiming, had that motion been granted, he would have been able to present the pretrial statements to the jury and no reasonable fact-finder would have found him

guilty. The court, however, "decline[d] to reach the merits of this claim since it was a proper subject for the previous petition for post[-]conviction relief and appeal," thus finding it precluded. Ariz. R. Crim. P. 32.2(a). Evanchyk did, in fact, challenge the court's denial of the motion to sever on direct appeal, a ruling we affirmed. *Evanchyk*, No. 2 CA-CR 94-0533, at 5-7. Because Evanchyk's claim that the pretrial statements qualify as newly available evidence entitling him to post-conviction relief is necessarily linked to his argument that his motion to sever should have been granted, a claim we previously considered and rejected on appeal, we conclude the court correctly dismissed this claim.

¶5 Evanchyk similarly argues Rule 32.1(h) required the trial court to consider a post-trial statement codefendant Carlos Ybarra had made to Evanchyk's attorney six years after Evanchyk was convicted. The trial court rejected this claim on the ground it was "not convinced that [Ybarra's] statement is sufficient to establish that no reasonable fact-finder would have found [Evanchyk] guilty of the underlying offense beyond a reasonable doubt." Evanchyk acknowledged in his Rule 32 petition that "Ybarra's post-trial statement, standing alone, would not entitle [Evanchyk] to relief." He thus argued, as he does on review, that Ybarra's post-trial statement should be considered in conjunction with the codefendants' pretrial statements as evidence of his innocence. However, because we have rejected Evanchyk's argument regarding the pretrial statements, and because he has conceded that admission of the post-trial statement in the absence of the pretrial statements does not

constitute a basis for relief, we find no abuse of discretion in the court's dismissal of this claim.

¶6 In a related argument, Evanchyk relies on *State v. Mejias*, 163 Ariz. 531, 789 P.2d 398 (App. 1990), and asserts, as he did below, trial counsel was ineffective for failing to request that the pretrial statements be admitted at trial, claiming the jury probably would not have found him guilty if the pretrial statements had been admitted. But this is not the first time Evanchyk raised a claim of ineffective assistance of trial counsel. He did so in his first Rule 32 proceeding. Successive claims of ineffective assistance of counsel "will be deemed waived and precluded" when they were raised or could have been raised in a previous proceeding. *State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002). Therefore, because Evanchyk waived his claim, the trial court properly dismissed it.

¶7 In addition, Evanchyk argues for the first time on review that his claim of ineffective assistance of counsel is of sufficient constitutional magnitude that it was not waived by his failure to raise it previously. To the extent Evanchyk suggests that an otherwise precluded claim will not, without more, be precluded if presented as a claim of sufficient constitutional magnitude, we reject that argument. He has not shown that the alleged error implicates a constitutional right that can only be waived personally in order to avoid preclusion, as contemplated by our supreme court in *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). Moreover, because this is not Evanchyk's first claim of ineffective assistance, it is precluded, and whether the claim is of sufficient constitutional magnitude

to avoid preclusion "is neither determinative nor relevant." *State v. Swoopes*, 216 Ariz. 390, ¶ 24, 166 P.3d 945, 953 (App. 2007). In any event, because Evanchyk presented the theory of sufficient constitutional magnitude for the first time in his petition for review, we do not address it. This court will not consider on review any issue on which the trial court has not first had an opportunity to rule. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

¶8 Evanchyk also argues that *State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002), constitutes a significant change in the law entitling him to relief pursuant to Rule 32.1(g), Ariz. R. Crim. P. In that case, our supreme court found that a defendant may only be held criminally liable based on an accomplice theory if the defendant "intended to aid or aided another in planning or committing" the offense at issue. *Id.* ¶ 37. Evanchyk claims the accomplice instruction in this case was incomplete in that it did not include language regarding the intent required for reckless second-degree murder, the offense the jury must have found him guilty of in light of the fact that it acquitted him of first-degree murder and burglary. As the state correctly noted in its response to the Rule 32 petition below, Evanchyk "could have, and should have, raised issues of jury instructions" on direct appeal. Other than stating, in an apparent attempt to avoid the preclusive effect of Rule 32.2(a)(3), that his claim constitutes a significant change in the law, Evanchyk has provided no support for that proposition. His challenge to the proffered accomplice instruction—that it was incomplete and did not address the intent required for reckless second-degree

murder—could have been raised on appeal. The trial court, therefore, properly found this claim precluded, ruling that *Phillips* "did not change the law but was merely an analysis of existing law and how accomplice liability should be applied to acts not intended by the accomplice."

¶9 Finally, Evanchyk presents for the first time on review a retroactivity analysis based on *State v. Slemmer*, 170 Ariz. 174, 823 P.2d 41 (1991), in which he claims that *Phillips* applies retroactively to his convictions. The trial court, however, properly found *Phillips* did not present a significant change in the law. In any event, because Evanchyk did not present this argument to the trial court, we do not address it on review. *Ramirez*, 126 Ariz. at 468, 616 P.2d at 928.

¶10 Therefore, although we grant the petition for review, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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J. WILLIAM BRAMMER, JR., Judge